

STATE OF MICHIGAN
COURT OF APPEALS

DYNASTY LIMOUSINE, INC.,
Plaintiff-Appellant,

UNPUBLISHED
January 31, 2006

v

No. 255284
Oakland Circuit Court
LC No. 2003-046999-CZ

EMMETT GREENE, d/b/a DYNASTY
SERVICES, d/b/a DYNASTY CORPORATE
DELIVERY SERVICE, d/b/a DYNASTY
ELEGANT LIMOUSINE SERVICE, d/b/a
DYNASTY LIMOUSINE SERVICE, d/b/a
DYNASTY EXECUTIVE SEDAN & LIMO
SERVICE, d/b/a DYNASTY EXECUTIVE
SEDAN SERVICE, and JAMES HODO, d/b/a
DYNASTY EXECUTIVE SEDAN SERVICE,

Defendants-Appellees.

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this suit arising from defendants' use of company names that are similar to plaintiff's company name in that they all use the mark "Dynasty," plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition of plaintiff's common-law claim of unfair competition. We affirm.

Plaintiff first argues that the trial court erred in granting defendants' motion under MCR 2.116(C)(8). A trial court's decision on a motion for summary disposition is reviewed de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Although defendants moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), the trial court did not specify under which subrule it granted the motion. However, a motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim based on the pleadings alone, *Corley, supra*, and it is apparent here that the trial court considered evidence outside the pleadings when deciding the motion. Thus, we find no merit to plaintiff's contention that the trial court decided defendants' motion under MCR 2.116(C)(8). Rather, it is clear that the motion was decided by the court under MCR 2.116(C)(10).

Plaintiff also argues, however, that summary disposition was improper under MCR 2.116(C)(10). We disagree. A motion for summary disposition under this subrule tests the

factual sufficiency of the complaint. *Corley, supra* at 278. When deciding the motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether the proffered evidence establishes a genuine issue of material fact. *Id.*

To prove a common-law claim of unfair competition based on infringement of a party's rights in a trade name, a plaintiff must prove that a business competitor has adopted a name that is confusingly similar to one already being used by another business and the similarity results in a likelihood or probability of confusion among consumers who are using ordinary care. *Peninsular Stove Co v Augst*, 288 Mich 465, 470; 285 NW 24 (1939); *Boron Oil Co v Callanan*, 50 Mich App 580, 584; 213 NW2d 836 (1973). Thus, common-law rights to a mark are acquired through prior actual use of the mark. *Interstate Brands Corp v Way Baking Co*, 403 Mich 479, 481; 270 NW2d 103 (1978); see also *Midwest Guaranty Bank v Guaranty Bank*, 270 F Supp 2d 900, 908 (ED Mich, 2003), citing *Allard Enterprises, Inc v Advanced Programming Resources, Inc*, 249 F3d 564, 571 (CA 6, 2001).¹

Defendants moved for summary disposition, asserting that there was no genuine issue of material fact that they had made use of the "Dynasty" name before plaintiff began operating in 1995. In support of their motion, defendants submitted an affidavit from defendant Emmet Greene, who averred that he began using the "Dynasty" name in various companies by 1994 or earlier. Defendants also submitted other evidentiary materials showing that they were using the "Dynasty" name before plaintiff began operating in 1995. Plaintiff argues that the evidentiary materials accompanying Greene's affidavit are insufficient to show actual use of the name in a commercial transaction, as required to establish priority in the mark. See *Allard Enterprises, Inc v Advanced Programming Resources, Inc*, 146 F3d 350, 357-358 (CA 6, 1998). We disagree.

The evidence submitted by defendants included customer invoices and agreements for service from defendant Dynasty Executive Sedan Service dating back to 1994. Contrary to plaintiff's assertion, we find that such evidence was sufficient to show prior actual use by defendants of the "Dynasty" mark in genuine commercial transactions. See *id.*

Plaintiff contends that even if defendants' evidence is sufficient to show actual, commercial use of the "Dynasty" name, evidence of defendants' use of the mark before 1995 is immaterial because defendants did not register the names of any of their businesses until 1997. Plaintiff maintains that defendants did not obtain any legal rights in the mark before that date because they failed to comply with the registration requirement of MCL 445.1. Again, we disagree.

MCL 445.1 requires a company operating under an assumed name to register that name with the state in order to conduct business transactions. The penalty for violating MCL 445.1 is set forth in MCL 445.5, which provides that a person who fails to comply with the registration requirement is guilty of a misdemeanor and is prohibited from enforcing any contract entered

¹ Michigan's common law regarding unfair competition tracks its federal counterpart. See *Clairol, Inc v Boston Discount Center of Berkley, Inc*, 608 F2d 1114, 1118 (CA 6, 1979).

into under the assumed name until he or she is in full compliance. MCL 445.5 expressly disallows, however, a noncomplying party to avoid a contract that is sought to be enforced by the other party to the contract. In support of its position that defendants' failure to comply with MCL 445.1 defeats their claim of superior priority rights to the mark, plaintiff cites only *Cashin v Pliter*, 168 Mich 386; 134 NW 482 (1912), and *Clark v Holman*, 204 Mich 62; 170 NW 23 (1918). However, neither of these cases supports plaintiff's claim that defendants' failure to comply with the registration requirements of MCL 445.1 precludes them from obtaining any legal right to the mark at issue. Rather, they merely reaffirm the prohibition, as stated in MCL 445.5, that an offending party cannot enforce a contract because, as to that party, the contract is void. *Cashin, supra* at 391; *Clark, supra* at 65. Indeed, the Court in *Cashin* stated that the enactment of which MCL 445.1 is a part "involves purely business transactions, and affects only money interests"

Because there is no genuine issue of material fact that defendants were using the "Dynasty" name in commercial transactions before plaintiff began using that mark in 1995, and because plaintiff has failed to show that MCL 445.1 has any effect on defendants' common-law right in the mark, the trial court properly granted summary disposition in favor of defendants.²

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

² In light of this disposition, we need not address plaintiff's additional claim involving defendant James Hodo, who plaintiff asserts possesses an ownership interest in at least one of the defendant companies also owned by Greene.